

United States
Circuit Court of Appeals

For the Ninth Circuit. //

WARREN H. PILLSBURY, Deputy Commissioner
of the United States Employees' Compensation
Commission for the 13th Compensation District,
Appellant,

vs.

THE CHARLES NELSON COMPANY, a Corpo-
ration, and FIREMAN'S FUND INSURANCE
COMPANY, a Corporation,
Appellees.

Transcript of Record.

Upon Appeal from the United States District Court
for the Northern District of California,
Southern Division.

FILED

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PAUL F. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS.

JOHN H. BLACK, Esq., JAMES M. WALLACE,
Esq., Attorneys for Plaintiffs and Appellees,
233 Sansome St., San Francisco, Calif.

GEO. J. HATFIELD, United States Attorney,
FRANCIS J. PERRY, Assistant United States At-
torney, Attorneys for Defendants and Appel-
lants.

In the Southern Division of the United States Dis-
trict Court, for the Northern District of Cali-
fornia.

In Equity.

2735-L

THE CHARLES NELSON CO., a corporation,
and
FIREMAN'S FUND INSURANCE COM-
PANY, a corporation,

Plaintiffs,

vs.

WARREN H. PILLSBURY, Deputy Commis-
sioner for the Thirteenth Compensation Dis-
trict under the Longshoremen's and Harbor
Workers' Compensation Act, and CHARLES
KUGLAND,

Defendants.

BILL OF COMPLAINT.

Come now the plaintiffs and for their bill of com-
plaint against the defendants allege as follows:

I.

That the plaintiff, The Charles Nelson Co., is now, and at all times herein mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of California, and an employer within the provisions of the Longshoremen's and Harbor Workers' Compensation Act.

II.

That the plaintiff, Fireman's Fund Insurance Company, is now and at all the times herein mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of California, and licensed to insure employers against liability arising by reason of the provisions of the Longshoremen's and Harbor Workers' Compensation Act; that said plaintiff, Fireman's Fund Insurance Company, a corporation [1*] is now and at all times herein mentioned was the insurance carrier for the plaintiff, The Charles Nelson Co., a corporation, in accordance with the provisions of said Act.

III.

That the defendant, Warren H. Pillsbury, is now and at all times herein mentioned was the deputy commissioner of the thirteenth compensation district under the provisions of the Longshoremen's and Harbor Workers' Compensation Act.

IV.

That on the 7th day of December, 1929, the defendant Charles Kugland sustained personal injury

*Page number appearing at the foot of page of original certified Transcript of Record.

on board the S. S. "Caddopeak", then afloat upon the navigable waters of the United States, in the harbor of San Francisco, State of California; that at the time said defendant, Charles Kugland, was injured he was employed by the plaintiff, The Charles Nelson Co., a corporation, and said injury occurred in the course of, and arose out of said employment.

V.

That thereafter a hearing thereon was had pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act before the defendant, Warren H. Pillsbury, as said deputy commissioner, on the 12th day of August, 1930, and a transcript thereof is attached hereto, marked "Exhibit A" and made a part hereof; that a subsequent hearing was had thereon on the 20th day of August, 1930, and a transcript thereof is attached hereto, marked "Exhibit B" and made a part hereof; That at the said hearings it was stipulated by and between the parties thereto that certain evidence adduced in the matter of Emmett Lawler, Claimant, vs. The Charles Nelson Co., a corporation, and Fireman's Fund Insurance Company, a corporation, and numbered 15207, then pending before said deputy commissioner, be deemed applicable to the said claim [2] of Charles Kugland; that a transcript of the testimony in said claim of Emmett Lawler is attached hereto, marked "Exhibit C", and made a part hereof; that a subsequent hearing was had thereon on the 25th day of September, 1930, and a

transcript thereof is attached hereto and marked "Exhibit D", and made a part hereof; that a subsequent hearing was had thereon on the 6th day of October, 1930, and a transcript thereof is attached hereto and marked "Exhibit E", and made a part hereof; that a subsequent hearing was had thereon on the 3rd day of November, 1930, and a transcript thereof is attached hereto and marked "Exhibit F", and made a part hereof; that as a result of said hearings a compensation order and award of compensation was made and filed by the defendant, Warren H. Pillsbury, as said deputy commissioner on November 7, 1930, a copy of which is attached hereto, marked "Exhibit G", and made a part hereof.

VI.

That at the hearings hereinbefore referred to, there was introduced the following documentary evidence;

Memorandum showing wages earned by Charles Kugland with Nelson S. S. Co., marked Exhibit A by the deputy commissioner;

Letter from Pacific Stevedoring Company dated October 9, 1930, marked Exhibit B by the deputy commissioner;

Letter from Gulf Pacific Line dated October 1, 1930, marked Exhibit C by the deputy commissioner;

Letter from San Francisco Stevedoring Company dated October 6, 1930, marked Exhibit D by the deputy commissioner;

Letter and statement of California Stevedore & Ballast Co., marked Exhibit A by the deputy commissioner;

Statement of the Los Angeles Steamship Company, marked Exhibit B. by the deputy commissioner;

[3]

Blue card entitled "Wage scale and working rules of the Longshoremen's Association on the part of San Francisco and Bay Districts, December 10, 1929—December 9, 1930", marked Exhibit A by the deputy commissioner;

Bulletin #404 of the U. S. Bureau of Labor Statistics, entitled "Union scale of wages and hours of labor, May 15, 1925", marked Exhibit B by the deputy commissioner;

Bulletin #409 of the U. S. Bureau of Labor Statistics, entitled "History of wages in the United States from colonial times to 1928", marked Exhibit C by the deputy commissioner;

"Report on marine and dock industrial relations, prepared under the direction of Commissioner T. V. O'Connor, U. S. Shipping Board, covering the period of June-1921, to February-1922", marked Exhibit D by the deputy commissioner;

That plaintiffs hereby refer to and make a part hereof, all of said documentary evidence introduced at the said hearings as hereinabove set forth.

That said documentary evidence is so voluminous that it is not practicable to annex copies thereof to this bill of complaint.

That the defendant, Warren H. Pillsbury, as said deputy commissioner, has agreed to and will file said documentary evidence in the above entitled court at the time he pleads to or answers this bill of complaint.

VII.

That said compensation order and award of compensation is not in accordance with law or with the provisions of the Longshoremen's and Harbor Workers' Compensation Act, in that the compensation awarded to said defendant, Charles Kugland, is not computed in the manner provided by said Act. [4]

WHEREFORE plaintiffs pray that said compensation order and award of compensation be suspended and set aside, and that the payments of the amounts required by said award be stayed pending the final decision herein, and for such other, further or different relief as to the court may seem equitable and just, together with costs of suit.

JOHN H. BLACK,

JAMES M. WALLACE,

Attorneys for Plaintiffs. [5]

State of California,
City and County of San Francisco.—ss.

L. J. Haefner, being first duly sworn, deposes and says:

That he is an officer, to-wit, the Assistant Marine Secretary of the Fireman's Fund Insurance Company, a corporation, one of the plaintiffs herein;

that he has read the foregoing bill of complaint and knows the contents thereof, and the same is true of his own knowledge, except as to matters therein stated upon information or belief, and as to those matters he believes them to be true.

L. J. HAEFNER.

Subscribed and sworn to before me this 3rd day of December, 1930.

(Seal)

HELEN M. FLETCHER,

Notary Public in and for the City and County of San Francisco, State of California.

My commission expires Oct. 14th, 1934.

[Endorsed]: Filed Dec. 4, 1930. [6]

(Title of Court and Cause.)

MOTION AND AFFIDAVITS FOR INTER-
LOCUTORY INJUNCTION.

Come now the above named plaintiffs, and by their attorneys, John H. Black, Esq., and James M. Wallace, Esq., move the court for an interlocutory injunction staying the payment of the amount required by the compensation order and award of compensation referred to in the bill of complaint on file herein, pending the final decision herein, on the ground that irreparable damage would otherwise result to the said plaintiffs.

This motion is based upon the records and files herein, and upon the affidavits of B. Lane and L. J.

Haefner attached hereto, and upon the verified bill of complaint on file herein.

JOHN H. BLACK,

JAMES M. WALLACE,

Attorneys for Plaintiffs. [7]

(Title of Court and Cause.)

State of California,

City and County of San Francisco.—ss.

B. Lane, being first duly sworn, deposes and says:

That she is an officer, to-wit, the Secretary of the plaintiff, The Charles Nelson Co., a corporation;

That the defendant, Charles Kugland, is insolvent, and if an interlocutory injunction is not issued herein staying payment of the amount required to be paid by the compensation order and award of compensation referred to in the bill of complaint herein, said payment will have to be made by plaintiffs to the defendant, Charles Kugland, and if the plaintiffs herein are successful in this action, said payment can not be recovered from the defendant, Charles Kugland, and the said plaintiffs will lose the benefits of any favorable decision herein; that by reason thereof said plaintiffs will suffer irreparable damage.

B. LANE.

Subscribed and sworn to before me this 3rd day of December, 1930.

(Seal)

HELEN M. FLETCHER,

Notary Public in and for the City and County of San Francisco, State of California.

My commission expires Oct. 14th, 1934. [8]

(Title of Court and Cause.)

State of California,
City and County of San Francisco.—ss.

L. J. Haefner, being first duly sworn, deposes and says:

That he is an officer, to-wit, the Assistant Marine Secretary of the plaintiff, Fireman's Fund Insurance Company, a corporation; that he has this day verified the bill of complaint on file herein, and by this reference makes the same a part hereof as though fully set forth herein;

That the defendant, Charles Kugland, is insolvent, and if an interlocutory injunction is not issued herein staying payment of the amount required to be paid by the compensation order and award of compensation referred to in the bill of complaint herein, said payment will have to be made by plaintiffs to the defendant, Charles Kugland, and if the plaintiffs herein are successful in this action, said payment can not be recovered from the defendant, Charles Kugland, and the said plaintiffs will lose the benefits of any favorable decision herein; that by reason thereof said plaintiffs will suffer irreparable damage.

L. J. HAEFNER.

Subscribed and sworn to before me this 3rd day of December, 1930.

(Seal) HELEN M. FLETCHER,

Notary Public in and for the City and County of San Francisco, State of California.

My commission expires Oct. 14th 1934.

[Endorsed]: Filed Dec. 4, 1930. [9]

(Title of Court and Cause.)

NOTICE OF HEARING OF MOTION FOR
INTERLOCUTORY INJUNCTION.

To WARREN H. PILLSBURY, Deputy Commissioner for the Thirteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act, and

To CHARLES KUGLAND:

You and each of you are hereby notified that the plaintiffs herein will, on Monday the 15th day of December, 1930, at the hour of 10:00 o'clock A. M. of said day, or as soon thereafter as counsel may be heard, bring on for hearing before the above entitled court, in the courtroom of the Honorable Harold Louderback, on the third floor of the United States Court House and Post Office Building, 7th and Mission Streets, San Francisco, California, the hereto attached motion for Interlocutory Injunction herein.

Said motion will be made upon the affidavits of B. Lane and L. J. Haefner, copies of which are attached hereto, and upon all of the records and files herein.

JOHN H. BLACK,

JAMES M. WALLACE,

Attorneys for Plaintiffs. [10]

(Title of Court and Cause.)

MOTION AND AFFIDAVITS FOR INTER-
LOCUTORY INJUNCTION.

Come now the above named plaintiffs, and by their attorneys, John H. Black, Esq., and James M. Wallace, *Exq.*, move the court for an interlocutory injunction staying the payment of the amount required by the compensation order and award of compensation referred to in the bill of complaint on file herein, pending the final decision herein, on the ground that irreparable damage would otherwise result to the said plaintiffs.

This motion is based upon the records and files herein, and upon the affidavits of B. Lane and L. J. Haefner attached hereto, and upon the verified bill of complaint on file herein.

JOHN H. BLACK,

JAMES M. WALLACE,

Attorneys for plaintiffs. [11]

(Title of Court and Cause.)

State of California,
City and County of San Francisco.—ss.

B. Lane, being first duly sworn, deposes and says:
That she is an officer, to-wit, the Secretary of the plaintiff, The Charles Nelson Co., a corporation;

That the defendant, Charles Kugland, is insolvent, and if an interlocutory injunction is not issued herein staying payment of the amount required to be paid by the compensation order and award of

compensation referred to in the bill of complaint herein, said payment will have to be made by plaintiffs to the defendant, Charles Kugland, and if the plaintiffs herein are successful in this action, said payment can not be recovered from the defendant, Charles Kugland, and the said plaintiffs will lose the benefits of any favorable decision herein; that by reason thereof said plaintiffs will suffer irreparable damage.

B. LANE.

Subscribed and sworn to before me this 3rd day of December, 1930.

(Seal)

HELEN M. FLETCHER,

Notary Public in and for the City and County of San Francisco, State of California.

My commission expires Oct. 14th, 1934. [12]

(Title of Court and Cause.)

State of California,
City and County of San Francisco.—ss.

L. J. Haefner, being first duly sworn, deposes and says:

That he is an officer, to-wit, the Assistant Marine Secretary of the plaintiff, Fireman's Fund Insurance Company, a corporation; that he has this day verified the bill of complaint on file herein, and by this reference makes the same a part hereof as though fully set forth herein;

That the defendant, Charles Kugland, is insolvent, and if an interlocutory injunction is not issued herein staying payment of the amount required to be paid by the compensation order and award of compensation referred to in the bill of complaint herein, said payment will have to be made by plaintiffs to the defendant, Charles Kugland, and if the plaintiffs herein are successful in this action, said payment can not be recovered from the defendant, Charles Kugland, and the said plaintiffs will lose the benefits of any favorable decision herein; that by reason thereof said plaintiffs will suffer irreparable damage.

L. J. HAEFNER.

Subscribed and sworn to before me this 3rd day of December, 1930.

(Seal) HELEN M. FLETCHER,
Notary Public in and for the City and County
of San Francisco, State of California.

My commission expires Oct. 14th, 1934

Due service and receipt of a copy of the within is hereby admitted this 9th day of December, 1930.

WARREN H. PILLSBURY,
per E. H. Peterson.

[Endorsed]: Filed Dec. 9, 1930. [13]

(Title of Court and Cause.)

MOTION TO DISMISS BILL OF COMPLAINT.

Comes now Warren H. Pillsbury, Deputy Commissioner for the Thirteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act, defendant in the above entitled action by and through his attorney and solicitor, Geo. J. Hatfield, United States Attorney, and moves the above entitled court to dismiss the Bill of Complaint of Petitioner on file herein on the following grounds:

That there is no bill in said equity and said bill does not state sufficient facts to constitute a cause of action in equity against said respondent, Warren H. Pillsbury.

Dated: February 27, 1931.

GEO. J. HATFIELD,

United States Attorney.

Service of the within Motion by copy admitted this 25th day of Feb. 1931.

JOHN H. BLACK,

JAMES M. WALLACE,

Attorney for Plf.

[Endorsed]: Filed Feb. 25, 1931. [14]

(Title of Court and Cause.)

MEMORANDUM OF ADDITIONAL
EXHIBITS.

In Paragraph Six of plaintiff's Bill of Complaint, reference is made to documentary evidence introduced at the hearing before the Deputy Commissioner of the United States Compensation Commission. These documents are now made a part of the record in this case and specifically identified as follows:

(1) Memorandum showing wages earned by Charles Kugland with Nelson Steamship Company, marked Exhibit "D" by Deputy Commissioner.

(2) Letter from Pacific Stevedoring Company dated October 9, 1930, marked Exhibit "B".

(3) Letter from Gulf Pacific Line dated October 1, 1930, marked Exhibit "C".

(4) Letter from San Francisco Stevedoring Company dated October 6, 1930, marked Exhibit "D".

The following exhibits also referred to in Paragraph Six of said complaint have been filed as exhibits in the case of *The Charles Nelson Company vs. Warren H. Pillsbury and Emmett Lawler*, No. 2716, to which reference is hereby made and incorporated in this action as if fully set out:

(1) Letter and statement of California Stevedore and Ballast Company, marked Exhibit "A" is set forth verbatim at page 4 in Exhibit "B" of the transcript in said action No. 2716.

(2) Statement of the Los Angeles Steamship Company marked Exhibit "B" by Deputy Commissioner, has been attached to the Memorandum of Additional Exhibits and marked Exhibit [15] No. "1" in action entitled Charles Nelson Company vs. Warren H. Pillsbury and Emmett Lawler, No. 2716.

(3) Blue card entitled "Wage scale and working rules of the Longshoremen's Association of the Port of San Francisco and Bay Districts, December 10, 1929; December 9, 1930", bulletin No. 404, bulletin No. 499 of the United States Bureau of Labor Statistics and report of Marine and Dock Industrial Relations are enclosed in the large envelopes and marked Exhibit No. "2" and made a part of the Memorandum of Additional Exhibits in the action of Charles Nelson Company vs. Warren H. Pillsbury and Emmett Lawler, No. 2716.

Exhibit "C" of the transcript in this file is missing. This exhibit is supposed to contain the complete transcript in the action entitled Charles Nelson Company vs. Warren H. Pillsbury and Emmett Lawler, No. 2716, and by stipulation it is made part of this action and to which reference is hereby made.

In Exhibit "D" of the transcript filed in this action, reference is made to report of the United States Public Health Service of September 12, 1930. This report is attached hereto and made a part of this memorandum.

In Exhibit "E" of the transcript filed in this action the following exhibits are referred to therein but were not made part of the record.

(1) Letter of Associated Terminals marked Exhibit "A" herein.

(2) Letter of McCormack Steamship Company, marked Exhibit "B" herein.

(3) Letter of Bayside Steamship Company marked Exhibit "C" herein, and [16]

(4) Reply of California Stevedore and Ballast Company to letter of Charles Nelson Company, to them of October 1, 1930, marked Exhibit "D" herein.

Dated: March 16, 1931.

GEO. J. HATFIELD,

United States Attorney.

FRANCIS J. PERRY,

Asst. United States Attorney.

[Endorsed]: Filed Mar. 16, 1931. [17]

District Court of the United States
Northern District of California
Southern Division.

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 16th day of March, in the year of our Lord one thousand nine hundred and thirty-one.

Present: the Honorable Frank H. Kerrigan, U. S. District Judge.

CHAS. NELSON CO.

v.

WARREN H. PILLSBURY

No. 2735

After hearing arguments of counsel, ordered motion for interlocutory injunction submitted. [18]

District Court of the United States
Northern District of California
Southern Division.

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Thursday, the 9th day of April, in the year of our Lord one thousand nine hundred and thirty-one.

Present: the Honorable Frank H. Kerrigan, U. S. District Judge.

THE CHARLES NELSON CO. et al.

vs.

CHARLES JUGLAND, et al.

No. 2735

This case having been heretofore submitted and due consideration having been had, it is ordered that the motion to Dismiss the Bill of Complaint herein be and is hereby Denied, and the awards be set aside with directions to the Commissioner to make awards in accordance with Opinion this day filed in case No. 2715. [19]

(Title of Court and Cause.)

Before KERRIGAN, District Judge. April 9, 1931.

JOHN H. BLACK, Esq., and JAMES M. WALLACE, Esq., both of San Francisco, California, attorneys for plaintiffs.

GEORGE J. HATFIELD, United States Attorney, and FRANCIS J. PERRY, Assistant United States Attorney, of San Francisco, California, attorneys for defendants.

MEMORANDUM OPINION.

The question presented by these three cases is the proper basis upon which to compute compensation due under the Longshoremen's and Harborworkers Act to an employee who has not worked at the same employment for substantially the whole of the year preceding his injury. The Commission has fixed 270 days worked as the measure of "substantially the whole" of the preceding year, and in each of the present cases the injured employee had worked less than 270 days in the year preceding his injury

The statutory provisions applicable are found in Sec. 10 of the Act, (44 Stat. 1431, 33 U. S. C. A. 910):

"Except as otherwise provided in this chapter, the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation and shall be determined as follows:

(a) If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary which he shall have earned in such employment during the days when so employed.

(b) If the injured employee shall not have worked in such employment during substantially the whole of such year, his average annual earnings shall consist of three hundred times the average daily wage or salary which an employee of the same class working substantially the whole of such immediately preceding year in the same or in similar employment in the same or a neighboring place shall have earned in such employment during the days when so employed. [20]

(c) If either of the foregoing methods of arriving at the annual average earnings of an injured employee can not reasonably and fairly be applied, such annual earnings shall be such sum as, having regard to the previous earnings of the injured employee and of other employees of the same or most similar class, working in the same or most similar employment in the same or neighboring locality, shall reasonable represent the annual earning capacity of the injured employee in the employment in which he was working at the time of his injury." * * *

We are here concerned with sections 10(b) and 10(c).

A brief statement of the pertinent facts in the three cases, designating them by the names of the employees, will indicate the problem.

1. Lawlor. This man earned about \$100 per month while working. During the year preceding his injury he lost three months work on account of illness. In the remaining nine months he worked less than five days a week. He was not a member of a regular gang of workmen, but went to the waterfront daily, looking for work. He describes himself as a "free lance" or "prospector". The Commissioner computed his compensation under Section 10(b), and used the average daily wage of one W. Davidson, who worked 297 days and received \$2138.95 in wages in the preceding year, as a member of a steady gang, as the basis for computing the compensation.

2. Pedersen. This man worked about 250 days, and earned about \$1600 during that period. He voluntarily reduced his earnings by laying off for about three months, apparently just because he had some money and did not feel like working. The Commissioner computed his earnings under Section 10(c), and again used the average daily wage of W. Davidson as reasonably representing the annual earning capacity of the injured employee.

3. Kugland. This man worked about 260 days. There is no evidence of lay off or illness. The wage statements produced show that he earned \$870.37.

He testified that he [21] earned from \$30 to \$35 a week, and that he worked for others than the companies submitting wage statements. Some of these other alleged employers reported that they had no record of wages paid to him. Section 10(b) was applied, and the wage of Davidson was again used as the basis for computation.

The use of the average daily wage of W. Davidson as the standard in each of these three cases resulted in an award of \$25 per week, the maximum award, to each man.

In connection with the Lawlor case certain evidence was taken concerning the conditions of employment among longshoremen and stevedores in San Francisco, and their earnings, which is made a part of the record in all these cases. From this evidence it appears that these men may be roughly classified into three groups, each comprising approximately one-third of the total number doing this type of work. The first group consists of the members of regular gangs, steadily employed, and earning from \$160 to \$185 per month. The second class, less regularly employed and somewhat less skilled or less well fitted for the work, earn from \$125 to \$150 per month. The third class, the "free lances" or "prospectors", are far less regularly employed, partly because they are not preferred by the employers and partly because many of them are satisfied to do just enough work for bare maintenance. They earn from \$65 to \$100 or a little more per month.

This evidence is relevant in considering the use by the Commissioner of the wages of W. Davidson as a basis for computing compensation, whether under Section 10(b) or 10(c). It appears, from their own testimony, that no one of the three men with whom we are here concerned actually earned an amount even approximately the earnings of Davidson, who clearly falls into the first group mentioned. Lawlor classifies himself as [22] a "prospector" and fixes his average monthly earnings while working at \$100 per month, or approximately at the rate of \$1200 per year. Pedersen was content with \$1600. Kugland, accepting his own highest estimate of \$35 per week, earned not over \$1670 per year. The last two men would appear to belong to the second group. On the basis of their own statements none of these men would be entitled to the maximum award.

Taking these facts into consideration, together with the evidence as to general working conditions, I believe that it must be held that Davidson is not in the "same class", as the phrase is used in Section 10(b) or "of the same or most similar class" as the phrase is used in Section 10(c). The manifest intention in both sections is to provide a basis for computing the wages of a man who has not worked substantially the whole of the preceding year which shall fairly represent his earning capacity. The use, as a basis for computation, of the average daily wage of a man of a group with higher earning power than that to which the injured em-

ployee belongs is not contemplated by the statute, and for this reason alone the motion to dismiss in each case should be denied.

In the case of Pedersen, in which Section 10(c) was applied, this was the only question raised. In the cases of Lawlor and Kugland, it is also contended that Section 10(c) rather than Section 10(b) should have been used. I believe that plaintiffs are correct in this regards for the reasons set forth by Judge Neterer in *Andrew F. Mahony Co. v. Marshall*, 46 Fed. 2nd 539, and by Judge McNary in *Luckenbach Steamship Co. v. Marshall*, D. C. Ore., March 16, 1931, not yet reported.

Accordingly the motion to dismiss is denied in each case, and the awards will be set aside with directions to the [23] Commissioner to make awards in accordance with this opinion in each case.

FRANK H. KERRIGAN,
U. S. District Judge.

[Endorsed]: Filed Apr. 9, 1931. [24]

In the Southern Division of the United States District Court, for the Northern District of California.

In Equity.

No. 2735-K

THE CHARLES NELSON CO., a corporation,
et al.,

Plaintiffs,

vs.

WARREN H. PILLSBURY, Deputy Commissioner for the Thirteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act, and CHARLES KUGLAND,
Defendants.

DECREE.

This cause came on to be heard at this term of court on March 16th, 1931, upon plaintiffs' bill of complaint, which said hearing was noted by the motion of defendant, Warren H. Pillsbury, Deputy Commissioner for the Thirteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act, to dismiss said bill of complaint on the ground that there was no bill in equity and that said bill did not state sufficient facts to constitute a cause of action in equity against said defendant, Warren H. Pillsbury, plaintiffs appearing in court by John H. Black, Esq., and James M. Wallace, Esq., said defendant, Warren H. Pillsbury appearing in court by Geo. J. Hatfield, Esq., United States Attorney, and Francis J. Perry, Esq.,

Assistant United States Attorney, and defendant Charles Kugland not appearing, although duly and regularly served by the United States Marshal, and said cause having been fully argued by counsel and submitted, the court having before it the full record of the proceedings held before the said Deputy Commissioner, and being of the [25] opinion that the bill of complaint is good and meritorious and states a cause of action, and that the compensation order and award of compensation complained of was and is contrary to law, now, therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the said motion of said defendant to dismiss the bill of complaint herein be, and the same is hereby denied, and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the compensation order and award of compensation made by said Deputy Commissioner in favor of said Charles Kugland, on November 7th, 1930, be and the same is hereby set aside and annulled, and the said Warren H. Pillsbury, Deputy Commissioner for the Thirteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act, is hereby enjoined from enforcing the said compensation order and award of compensation made by him on November 7th, 1930, and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that said Deputy Commissioner be, and he is hereby directed to make a compensation order and award of compensation in said pro-

ceeding in accordance with the opinion filed in this court on April 9th, 1931, in the case of The Charles Nelson Co., a corporation, et al., plaintiffs, vs. Warren H. Pillsbury, Etc., and T. Pedersen, defendants, numbered 2715-K, and that no other or further or different award or order be made or entered.

Dated: May 19th, 1931.

FRANK H. KERRIGAN,
United States District Judge.

Approved as to form as provided in Rule 22.

.....
United States Attorney.

[Endorsed]: Filed and entered May 19, 1931.

[26]

—————
(Title of Court and Cause.)

**DISAPPROVAL OF DECREE AND REASON
THEREFOR.**

To the above-entitled Court and to Plaintiffs above named and to JOHN H. BLACK and JAMES M. WALLACE, Esqs., Attorneys for Plaintiffs:

Defendant, WARREN H. PILLSBURY, hereby disapproves of the form of decree served upon GEO. J. HATFIELD, ESQ., United States Attorney, Attorney for said Defendant, WARREN H. PILLSBURY, on May 14th, 1931, and for reasons therefor, hereby specifies:

(1) That said decree is uncertain in this, that reference therein has been made to an opinion of

this Court filed on April 1, 1931, and made a part of said decree by reference, whereas that which was determined in said opinion should be set forth in said decree.

Dated: San Francisco, California, May 16th, 1931.

GEO. J. HATFIELD,

United States Attorney,

Attorney for Defendant

Warren H. Pillsbury.

Objections to decree overruled.

May 19/31.

FRANK H. KERRIGAN,

U. S. Dist. Judge.

[Endorsed]: Filed May 19, 1931. [27]

(Title of Court and Cause.)

NOTICE OF ENTRY OF DECREE

To the defendant Warren H. Pillsbury, Deputy Commissioner for the Thirteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act, and To Geo. J. Hatfield, United States Attorney and Francis J. Perry, Assistant United States Attorney, attorneys for said defendant:

You and each of you will please take notice that a decree dismissing the bill of complaint herein and setting aside and annulling the compensation order and award of compensation made by said deputy

commissioner, a copy of which decree is annexed hereto and made a part hereof, was made herein on May 19th, 1931 by the Honorable Frank H. Kerrigan, United States District Judge, and said decree was entered in the office of the Clerk of the above entitled court on May 19th, 1931.

Dated: May 23rd, 1931.

JOHN H. BLACK,

J. M. WALLACE,

Attorneys for Plaintiffs. [28]

In the Southern Division of the United States District Court, for the Northern District of California.

In Equity.

No. 2735-K

THE CHARLES NELSON CO., a corporation,
et al.,

Plaintiffs,

vs.

WARREN H. PILLSBURY, Deputy Commissioner for the Thirteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act, and CHARLES KUGLAND,

Defendants.

DECREE.

This cause came on to be heard at this term of court on March 16th, 1931, upon plaintiffs' bill of

complaint, which said hearing was noted by the motion of defendant, Warren H. Pillsbury, Deputy Commissioner for the Thirteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act, to dismiss said bill of complaint on the ground that there was no bill in equity and that said bill did not state sufficient facts to constitute a cause of action in equity against said defendant, Warren H. Pillsbury, plaintiff appearing in court by John H. Black, Esq., and James M. Wallace, Esq., said defendant, Warren H. Pillsbury appearing in court by Geo. J. Hatfield, Esq., United States Attorney, and Francis J. Perry, Esq., Assistant United States Attorney, and defendant Charles Kugland not appearing, although duly and regularly served by the United States Marshal, and said cause having been fully argued by counsel and submitted, the court having before it the full record of the proceedings held before the said Deputy Commissioner, and being of the [29] opinion that the bill of complaint is good and meritorious and states a cause of action, and that the compensation order and award of compensation complained of was and is contrary to law, now, therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the said motion of said defendant to dismiss the bill of complaint herein be, and the same is hereby denied, and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the compensation order and award of compensation made by said Deputy Com-

missioner in favor of said Charles Kugland, on November 7th, 1930, be and the same is hereby set aside and annulled, and the said Warren H. Pillsbury, Deputy Commissioner for the Thirteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act, is hereby enjoined from enforcing the said compensation order and award of compensation made by him on November 7th, 1930, and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that said Deputy Commissioner be, and he is hereby directed to make a compensation order and award of compensation in said proceeding in accordance with the opinion filed in this court on April 9th, 1931, in the case of The Charles Nelson Co., a corporation, et al., plaintiffs, vs. Warren H. Pillsbury, Etc., and T. Pedersen, defendants, numbered 2715-K, and that no other or further or different award or order be made or entered.

Dated: May 19th, 1931.

FRANK H. KERRIGAN,
United States District Judge.

Approved as to form as provided in Rule 22.

.....
United States Attorney.

Due service and receipt of a copy of the within is hereby admitted this 23rd day of May, 1931.

GEO. J. HATFIELD,
Attorney for Defendant
Warren H. Pillsbury.

[Endorsed]: Filed May 23, 1931. [30]

(Title of Court and Cause.)

PETITION FOR APPEAL.

To the Honorable Judge of the District Court of the United States for the Northern District of California:

WARREN H. PILLSBURY, Deputy Commissioner of the United States Employees' Compensation Commission for the 13th Compensation District, defendant in the above-entitled matter and appellant herein, feeling aggrieved by the order and decree made and entered in the above-entitled cause on the 19th day of May, 1931, denying defendant's motion to dismiss complainant's Bill of Complaint and application for Mandatory Injunction and enjoining said defendant from enforcing the compensation order and award of compensation of said defendant entered on the 7th day of November, 1930, does hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons set forth in the Assignments of Errors filed herewith.

WHEREFORE petitioner prays that his appeal be allowed and that citation be issued as provided by law and that a transcript of the record, proceedings and documents and all of the papers upon which said order and decree were based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit under the rules of such court and in accordance with the law in such cases made and provided.

Dated: July 2, 1931.

GEO. J. HATFIELD,
United States Attorney
Attorney for Warren H. Pillsbury,
defendant and appellant.

[Endorsed]: Filed Jul. 2, 1931. [31]

(Title of Court and Cause.)

ASSIGNMENT OF ERRORS.

The defendant, Warren H. Pillsbury, Deputy Commissioner of the United States Employees' Compensation Commission, for the 13th Compensation District, appealing from decree of mandatory injunction of the District Court, made and entered on the 19th day of May, 1931, denying said defendant's motion to dismiss, and assigns as error the action of the Court as follows:

I.

The Court erred in denying defendant's motion to dismiss plaintiff's bill of complaint.

II.

The Court erred in finding and decreeing that the said Bill of Complaint is good and meritorious, and states a cause of action, and that the compensation order and award of compensation complained of was and is contrary to law, and not supported by the evidence.

III.

The Court erred in ordering and decreeing that the bill of complaint states a bill in equity, and that it states sufficient facts to constitute a cause of action in equity.

IV.

The Court erred in ordering, adjudging and decreeing that the said motion of said defendant Warren H. Pillsbury to dismiss the bill of complaint be denied.

V.

The Court erred in ordering, adjudging and decreeing that the compensation order and award of compensation of November 7, 1930, be set aside and annulled.

VI.

The Court erred in ordering, adjudging and decreeing [32] that said defendant Warren H. Pillsbury be enjoined from enforcing by legal or other methods and means the said compensation order and award of compensation entered on the 7th day of November, 1930.

VII.

The Court erred in ordering, adjudging and decreeing that said Deputy Commissioner be directed to make a compensation order and award of compensation in said proceeding in accordance with the opinion filed herein on April 9, 1931, and that no other, or further, or different award or order be made or entered.

VIII.

The Court erred in ordering, adjudging and decreeing that the Deputy Commissioner be directed to make a compensation order and award of compensation in accordance with the opinion filed herein on April 9, 1931; said decree should set forth specifically what said Deputy Commissioner was directed to do, rather than by reference to said memorandum of opinion.

IX.

The Court erred in not sustaining motion to dismiss of defendant Warren H. Pillsbury to the bill of complaint.

X.

The Court erred in not ordering, adjudging and decreeing that there is no bill in said equity and said bill does not state sufficient facts to constitute a cause of action in equity against said defendant Warren H. Pillsbury.

XI.

The Court erred in not finding and decreeing that the said compensation order and award of compensation was and is [33] in accordance with law and supported by substantial competent evidence.

GEO. J. HATFIELD,

United States Attorney,
Attorney for Warren H. Pillsbury
Defendant and Appellant.

Receipt of the within by copy admitted this 2nd day of July, 1931.

JOHN H. BLACK & J. M. WALLACE,
Attorney for Plffs.

[Endorsed]: Filed Jul. 2, 1931. [34]

(Title of Court and Cause.)

ORDER ALLOWING APPEAL.

On motion of Geo. J. Hatfield, United States Attorney for the Northern District of California, Attorney for Defendant and Appellant in the above-entitled cause,

It Is Hereby Ordered that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the order and decree heretofore made and entered in the above entitled cause be, and the same is hereby allowed, and that a sworn transcript of the records, testimony, exhibits, stipulations and all proceedings be transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit in the manner and time prescribed by law.

Dated: July 2nd, 1931.

FRANK H. KERRIGAN,
United States District Judge.

[Endorsed]: Filed Jul. 2, 1931. [35]

(Title of Court and Cause.)

PRAECIPE.

To the Clerk of Said Court:

Sir: Please issue

1. Bill of Complaint and Application for Mandatory Injunction.
2. Motion and Affidavit for Interlocutory Injunction.
3. Notice of hearing of Motion for Interlocutory Injunction.
4. Motion to Dismiss Bill of Complaint filed by Warren H. Pillsbury.
5. Memorandum of Additional Exhibits.
6. Minute Order of March 16, 1931 that defendant have three days to file brief and that the matter be submitted.
7. Minute order of April 9, 1931, denying Motion to Dismiss.
8. Memorandum of Opinion of February 28, 1931.
9. Decree of Mandatory Injunction.
10. Disapproval of Decree.
11. Notice of Filing Decree of Mandatory Injunction.
12. Petition for Appeal.
13. Order Allowing Appeal.
14. Citation on Appeal.
15. This Praecipe.

Receipt of the within by copy admitted this 3rd day of July, 1931.

JOHN H. BLACK & J. M. WALLACE,
Attorney for.....

GEO. J. HATFIELD,
United States Attorney
Attorney for Defendant
Warren H. Pillsbury.

[Endorsed]: Filed Jul. 3, 1931. [36]

(Title of Court and Cause.)

PRAECIPE.

To the Clerk of Said Court:

Sir: Please issue the following exhibits:

1. Memorandum showing wages amounting to \$706.30 earned by Charles Kugland with Nelson S. S. Co. marked Exhibit "A" by the Deputy Commissioner at the hearing before said Commissioner on November 3, 1931;

2. Letter from Pacific Stevedoring Co. dated October 9, 1930, showing no wages earned by Charles Kugland, marked Exhibit "B" by the Deputy Commissioner at the hearing before him on November 3, 1930;

3. Letter from Gulf-Pacific Line dated October 1, 1930, marked Exhibit "C" by the Deputy Commissioner at the hearing held before him on November 3, 1930;

4. Letter from San Francisco Stevedore Co. dated October 6, 1930, showing wages earned by Chas. Kugland in the sum of \$156.87, marked Exhibit "D" by the Deputy Commissioner at the hearing held before him on November 3, 1930;

5. Letter and statement of California Stevedore & Ballast Co. marked Exhibit "A" by the Deputy Commissioner at the hearing of the application of Emmett Lawler held before him on August 20, 1930;

6. Statement of Los Angeles S. S. Co. marked Exhibit "B" by the Deputy Commissioner at the hearing of the application of Emmett Lawler held before him on August 20, 1930;

7. This counter-praecepe.

JOHN H. BLACK,

J. M. WALLACE,

Attorneys for plaintiffs and
appellees.

Service and receipt of a copy of the foregoing counter-praecepe is hereby acknowledged this 8 day of July, 1931.

GEO. J. HATFIELD,

Attorneys for defendant,

Warren H. Pillsbury.

[Endorsed]: Filed Jul. 8, 1931. [37]

(Title of Court and Cause.)

PRAECIPE.

To the Clerk of Said Court:

Sir:

Please issue a certified copy of the following paper to be used in preparing transcript on appeal in the above-entitled case in addition to copies of papers heretofore requested to issue for the same purpose and listed in praecipe filed with you on July 3, 1931.

Assignment of Errors.

GEO. J. HATFIELD,

Attorney for Defendant
Warren H. Pillsbury.

Service of the within praecipe by copy admitted this 9 day of July, 1931.

JAMES M. WALLACE,

Attorney for Plaintiff.

[Endorsed]: Filed Jul. 9, 1931. [38]

(Title of Court and Cause.)

CERTIFICATE OF CLERK, U. S. DISTRICT
COURT TO TRANSCRIPT OF RECORD.

I, WALTER B. MALING, Clerk of the District Court of the United States in and for the Northern District of California, do hereby certify the foregoing 38 pages, numbered from 1 to 38 inclusive, to be a full, true and correct copy of the record and

proceedings as enumerated in the praecipis for record on appeal, as the same remain on file and of record in the above-entitled suit, in the office of the Clerk of said Court, and that the same constitutes the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is \$11.00; that said amount has been charged against the United States and the original Citation issued in said suit is hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 24th day of July, A. D. 1931.

(Seal) WALTER B. MALING,
Clerk United States District Court for the Northern
District of California. [39]

United States of America.—ss.

The President of the United States of America
To THE CHARLES NELSON COMPANY, a corporation, and FIREMAN'S FUND INSURANCE COMPANY, a corporation, and to their Attorneys Messrs. JOHN H. BLACK and J. M. WALLACE, Greeting:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of Califor-

nia, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California wherein Warren H. Pillsbury, Deputy Commissioner of the United States Employees' Compensation Commission for the 13th Compensation District is appellant, and you are appellees, to show cause, if any there be, why the decree or judgment rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the honorable Frank H. Kerrigan, United States District Judge for the Northern District of California this 2nd day of July, A. D. 1931.

FRANK H. KERRIGAN,

United States Dist. Judge.

Receipt of the within by copy admitted this 2nd day of July, 1931.

JOHN H. BLACK and

J. M. WALLACE,

Attorneys for Plff. [40]

[Endorsed]: No. 6544. United States Circuit Court of Appeals for the Ninth Circuit. Warren H. Pillsbury, Deputy Commissioner of the United States Employees' Compensation Commission for the 13th Compensation District, Appellant, vs. The

Charles Nelson Company, a Corporation, and Fireman's Fund Insurance Company, a Corporation, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed July 29, 1931.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By FRANK H. SCHMID,

Deputy Clerk.

